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NO. 82-1727

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

SAMUEL THOMAS RICKMAN,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

APPELLANT'S REPLY BRIEF

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ATTORNEY FOR APPELLANT

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ISSUES DISCUSSED

I.

The State relies on a misinterpretation of the case law in arguing that the Appellant did not properly raise the question presented to this Court below.

II.

The State fails to show any legitimate interest in denying constitutional review in this Court of the question presented by Appellant.

III

Contrary to argument by the State, the highest Courts of the State of Georgia have, in fact, ruled on the constitutionality of the State law drawn into question by Appellant.

IV.

The State fails to address the substance of Appellant's arguments that the State law drawn into question is unconstitutional.

V.

The State fails to address the issue of improper application of the statute drawn into question by Appellant.

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JURISDICTION

Appellant, SAMUEL THOMAS RICKMAN, filed his Appeal from the Supreme Court of Georgia in this Honorable Court on April 22, 1983. Appellee, State of Georgia, filed its Motion to Dismiss or Affirm in this Court on or about May 20, 1983, the date on which Appellee certifies that a copy of said Motion was sent to attorney for Appellant. Pursuant to Rule 22.5, Rules of the Supreme Court of the United States, Appellant

submits this Reply Brief, addressing arguments first raised in Appellee's Motion to Dismiss or Affirm.

ARGUMENT

I. THE STATE RELIES ON A MISINTERPRETATION OF THE CASE LAW IN ARGUING THAT THE APPELLANT DID NOT PROPERLY RAISE THE QUESTION PRESENTED TO THIS COURT BELOW. (Ga. Code Ann. §§ 26-801 and 26-802 [O.C.G.A. §§ 16-2-20 and 16-2-21]).

As set forth in Appellant's Jurisdictional Statement, at trial Appellant objected to the substance of the unconstitutional manner in which the State was proceeding against him by way of use of the afore-cited parties to a crime statute and, at the first opportunity, when the parties to a crime statute was charged to the jury, objected to that charge. Moreover, Appellant clearly has raised the issue of the unconstitutionality of this State statute with the Appellate Courts of the State of Georgia; and this not even the State in its Motion to Dismiss or Affirm can deny. For example, the State, in

its Motion to Dismiss or Affirm, cites from the Court of Appeals of Georgia Opinion in this case the specific language by which the Georgia Court of Appeals recognizes that Appellant has raised this issue and wherein the Court of Appeals proceeds to "note that the Supreme Court [has] held that Code Ann. §§ 26-801 and 26-802 were not unconstitutionally vague, indefinite, and overbroad." Rickman v. State, 164 Ga.App. 366, 372, 296 S.E.2d 726 (1982); citing Wanzer v. State, 232 Ga. 523 (6), 207 S.E.2d 466 (1974).

The unconstitutionality, both on its face and as applied, of the Georgia parties to a crime statute has not only been presented to the highest courts of the State of Georgia, but has consistently been held to be constitutional in the face of such challenges. Id.

The State, in its Motion, cites the Opinion of the Supreme Court of the United States in Cardinale v. Louisiana, 394 U.S. 437 (1969) in support of its argument that this Court should not entertain Appellant's Appeal. See, Appellee's Motion to Dismiss or Affirm at 12. The State's reliance on this case is wrong. Cardinale v. Louisian, id., is in no way relevant to the case sub judice, wherein the issue was raised in the State Courts below and all lower Courts have held against Appellant; hence, Appellant's direct Appeal

pursuant to 28 U.S.C. § 1257(2). Cardinale, id., on the other hand, stands for the proposition that when the appellant to the Supreme Court of the United States has not raised a question in any lower State Court in any manner whatsoever, but raises it for the very first time on Appeal to this Court, the matter will not be reviewed. Id. 394 U.S. 437, 438.

Appellant is not asking this Court to review a matter which has not been raised at all in the State Courts. Even if the Court were to agree with Appellee that Appellant is prejudice because he did not raise the attack on the State statute at issue in the precise language and format, and at the specific time deemed appropriate by the State, it is obvious that the constitutionality of the statute at issue here has been drawn into question at the Appellate Courts in the State of Georgia, wherein the statute has been held to be constitutional. Rickman v. State, 164 Ga.App. 366, 372, 296 S.E.2d 726 (1982).

To Appellant, the State's argument in its Motion to Dismiss or Affirm is yet another example of the manner in which the State of Georgia attempts to skirt constitutional review of its State statutes by the Supreme Court of the United States. Wright v. Georgia, 373 U.S. 284 (1963); see also, other cases raised by Appellant at pp.

9-17, Appellant's Jurisdictional Statement.

II. THE STATE FAILS TO SHOW ANY LEGITIMATE INTEREST IN DENYING CONSTITUTIONAL REVIEW IN THIS COURT OF THE QUESTION PRESENTED BY APPELLANT.

In its Motion to Dismiss or Affirm, the State of Georgia does not even address, much less establish, a legitimate State interest in denying the constitutional review of the State statute drawn into question by Appellant. Perhaps if the State of Georgia could or would show a legitimate State interest to be served by its reliance on procedural rules to deny a constitutional attack on its statute, review by this Court might be circumvented. Douglas v. Alabama, 380 U.S. 415, 422 (1965). Simply repeating the hollow and conclusory statements that the Georgia parties to a crime statute is "not unconstitutional" as did the Court of Appeals of Georgia in rendering its decision below, the State utterly fails to meet its burden in attempting to deny constitutional review of the statute at issue by this Court, in the face of Appellant's Jurisdictional Statement.

Moreover, these jurisdictional issues themselves are properly reviewable by the Supreme Court of the United States. Henry v. Mississippi, 379 U.S. 443, 447 (1965); citing, Love v. Griffith, 266 U.S. 32, 32-34 (1924).

The State attempts to wind its way out of having to address the issue by stating that Appellant had an appropriate State remedy still at his disposal -- habeas corpus -- and that, therefore, it really does not matter whether the statute is unconstitutional or not. See, Appellee's Motion to Dismiss or Affirm at 20. In this conclusion, the State is wrong.

The State cites Hammock v. Zant, 243 Ga. 259, 253 S.E.2d 727 (1979), in support of its proposition that Appellant should properly raise these matters in a State habeas corpus proceeding rather than by way of Appeal to the Supreme Court of the United States. However, the Supreme Court of Georgia held, in Hammock, id., that a writ of habeas corpus clearly cannot be used as a writ of error. In other words, Appellant cannot in Georgia properly use a habeas corpus proceeding to correct errors of law once he has raised these issues with the Georgia Courts and had them decided against him. The issues are then res judicata and cannot be raised collaterally on a habeas. Id. In the case sub

judice, Appellant has drawn into question the constitutionality of the Georgia parties to a crime statute, and on Appeal has had the issues denied by the Court of Appeals and the Supreme Court of Georgia. The issue properly is before this Court and not a lower State Court on a habeas proceeding.

III. CONTRARY TO ARGUMENT BY THE STATE THE HIGHEST COURTS OF THE STATE OF GEORGIA HAVE , IN FACT, RULED ON THE CONSTITUTIONALITY OF THE STATE LAW DRAWN INTO QUESTION BY APPELLANT.

Contrary to argument by the State in its Motion to Dismiss or Affirm, the highest Courts of the State of Georgia have ruled on, and have held to be constitutional, the Georgia parties to a crime statutes, specifically in this case finding that:

> "The Supreme Court [has] held that [the parties to a crime statutes] were not unconstitutionally vague, indefinite and overbroad." Rickman v. State, 164 Ga.App. 366, 372, 296 S.E.2d 726 (1982); citing, Wanzer v. State, 232 Ga. 523 (6), 207 S.E.2nd 466 (1974).

IV. THE STATE FAILS TO ADDRESS THE SUBSTANCE OF APPELLANT'S ARGUMENTS THAT THE STATE LAW DRAWN INTO QUESTION IS UNCONSTITUTIONAL.

Appellant raised extensive, substantive arguments that the Georgia parties to a crime statutes are unconstitutional on their face. Appellant cited extensively from legislative history and case law concerning these statutes, codified in Georgia as Ga. Code Ann. §§ 26-801 and 26-802 (now, O.C.G.A. §§ 16-2-20 and 16-2-21). In its Motion to Dismiss or Affirm, the State merely recites earlier conclusions of law and presents to the Court irrelevant language on the general issue of notice to a defendant. This is clearly an unsatisfactory response to substantive and important constitutional issues raised by Appellant, which, Appellant respectfully urges, mandates review of this statute on constitutional terms, by this Court.

V. THE STATE FAILS TO ADDRESS THE ISSUE OF IMPROPER APPLICATION OF THE STATUTE DRAWN INTO QUESTION BY APPELLANT.

Appellant argued in his Jurisdictional Statement that the Georgia parties to a crime statute has been and continues to be widely misapplied not only in his case but in numerous other cases. For example, it is being used as a conspiracy statute in circumvention of its intended legislative purpose, and in an effort to obtain convictions on a conspiratorial basis without having to establish the elements of conspiracy, which the State cannot do once the substantive crime charged has been proved. Evans v. State, 161 Ga.App. 468, 471, 288 S.E.2d 726 (1982); see also, cases cited by Appellant in his Jurisdictional Statement at pp. 22-29.

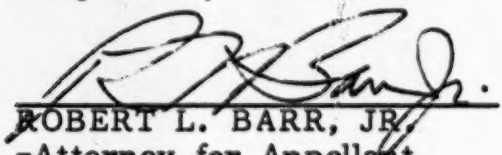
If the State deems this issue unimportant, or cannot meet the elements of Appellant's constitutional attack on the Georgia parties to a crime statute, then Appellant's assertions certainly must be addressed by this Court, a fortiori in light of the fact that the State has failed to rebutt them.

CONCLUSION

Appellant submits that the issues presented to this Honorable Court in his Jurisdictional Statement are properly before this Court, have not been addressed, must less rebutted by the State of Georgia in its Motion

to Dismiss or Affirm, and that the State has failed to show the issue should not be before this Court. Nor has the State shown in any manner other than recitation of earlier conclusory statements, that the issues presented are not substantial. Appellant respectfully shows that the issues which he has presented in his Jurisdictional Statement should be decided by this Court as they raise substantial questions of constitutional law.

Respectfully submitted,



ROBERT L. BARR, JR.
-Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CETIFY that I have this date served three (3) true and correct copies of the foregoing Appellant's Reply Brief, by United States mail, postage prepaid, upon:

Mary Beth Westmoreland,
Assistant Attorney General
132 State Judicial Building
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Atlanta, Georgia 30334

and one (1) true and correct copy upon:

James T. Martin, Esq.
Assistant District Attorney
Cobb Judicial Circuit
P. O. Box 649
Marietta, Georgia 30061

This 31st day of May, 1983.

ROBERT L. BARR, Jr.
-Attorney for Appellant